

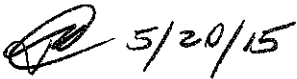


Michael R. Pence, Governor  
State of Indiana

*Indiana Family and Social Services Administration*  
402 W. WASHINGTON STREET, P.O. BOX 7083  
INDIANAPOLIS, IN 46207-7083

TO: Erik Scheub  
Office of Small Business and Entrepreneurship

FROM: Joseph Moser, Medicaid Director

APPROVED BY: John J. Wernert, M.D., Secretary  5/20/15

RE: Small Business Economic Impact Analysis of Proposed Rule LSA # 14-337  
405 IAC 5-22-1 Definitions  
405 IAC 5-22-6 Occupational, physical and respiratory therapy and speech pathology; criteria for prior authorization  
405 IAC 5-22-8 Physical Therapy Services  
405 IAC 5-22-10 Respiratory Therapy Services  
405 IAC 5-22-11 Occupational Therapy Services  
405 IAC 5-22-12 Applied Behavior Analysis (ABA) Therapy Services

DATE: May 20, 2015

CC: Paul Bowling, Susan Gard, Joy Heim, Brandon Shirley, Tiffany Mulligan

This memo is submitted in accordance with IC 4-22-2.1 and formalizes the Indiana Family and Social Services Administration ("FSSA") Office of Medicaid Policy and Planning's ("OMPP") analysis of the small business impact of the attached rule amendment.

### **Summary of the Rule Amendment**

The proposed rule both amends and adds sections to 405 IAC 5-22. The amendment is necessary to align FSSA policy regarding nursing and therapy services with a permanent injunction issued in *A.M.T., et al. v. Gargano*, U.S. District Court for the Southern District of Indiana, Cause No. 1:10-cv-0358-JMS-TAB (Feb. 10, 2011). Specifically, the proposed rule provides that FSSA will cover services for individuals under age twenty-one and makes necessary updates to definitions and coverage requirements in compliance with the injunction. The proposed rule also amends certain definitions set forth in 405 IAC 5-22-1 to clearly delineate the therapy services covered. Finally, the proposed rule adds a section authorizing the coverage of applied behavior analysis (ABA) therapy services and outlines coverage and eligibility requirements.

## **Impact on Small Business**

The following section provides responses to the following questions outlined in IC 4-22-2.1-5:

- 1. An estimate of the number of small businesses, classified by industry section that will be subject to the proposed rule.**

IC 5-28-2-6 defines a small business as a business entity that satisfies the following requirements:

- (1) On at least fifty percent (50%) of the working days of the business entity occurring during the preceding calendar year, the business entity employed not more than one hundred fifty (150) employees.
- (2) The majority of the employees of the business entity work in Indiana.

For SFY 2015, the FSSA – OMPP estimates that there are approximately 1,709 therapy providers that meet the criteria of a small business and may be affected by the proposed rule. In addition, the FSSA – OMPP estimates that there may be 209 board certified behavior analysts some of which may meet the criteria of a small business and may be impacted by the section of the proposed rule adding ABA therapy services.

This proposed rule is updating 405 IAC 5-22 so that it is consistent with the ruling in *A.M.T. vs. Gargano*, which has been implemented through policy since 2011. Accordingly, there should be no additional impact to small businesses as a result of this rule change.

- 2. An estimate of the average annual reporting, record keeping, and other administrative costs that small business will incur to comply with the proposed rule.**

Provider participation in the Medicaid program is voluntary. For those providers that are occupational therapy assistants, the proposed rule updates the licensure and supervision requirements so that the rule is consistent with Ind. Code 25-23.5-3 and Ind. Code 25-23.5-1-6. The proposed rule provides that if occupational therapy services are performed by an assistant rather than a therapist, the assistant must be licensed. The proposed rule will still require supervision of occupational therapy assistants, but removes the requirement that such supervision be direct and onsite. Furthermore, the proposed rule aligns FSSA - OMPP's rules with its current policy of requiring prior authorization for therapy services for acute conditions. The FSSA – OMPP anticipates that the proposed rule may impose minimal additional annual reporting, record keeping, or administrative costs on small businesses in order to comply with the proposed rule.

For those providers who choose to provide occupational therapy services, any additional administrative costs are required by existing law.

In regards to the section of the proposed rule adding ABA therapy services, new Medicaid service providers must comply with Medicaid program requirements to enroll as a Medicaid provider and to receive reimbursement. For example, providers who are not already providing Medicaid services are required to enroll as a Medicaid provider with FSSA. A provider must pay an approximate \$550 application fee at the initial enrollment. Providers also must comply with certain record retention and reimbursement claim rules. These administrative processes are generally consistent with the processes required for providers under many commercial insurance plans in which they may participate. Thus, the proposed rules do not impose or mandate any administrative costs on any small providers that are not already part of the costs regularly incurred by small business medical providers. Furthermore, for those providers who choose to provide covered ABA services through the Medicaid program, any additional administrative costs are required by law.

**3. An estimate of the total annual economic impact that compliance will have on small businesses subject to the rule.**

Compliance with the proposed rule should not impose any additional impact to small businesses, other than their routine administrative costs of compliance, and FSSA - OMPP expects this increase will be more than offset by increases in revenue for providing services.

**4. A statement justifying any requirement or cost that is imposed by the rule and not expressly required by law. The statement must reference any data, studies, or analyses relied upon by the agency in determining imposition of the requirement or cost is necessary.**

As noted above, the proposed rule is necessary for FSSA – OMPP to comply with the permanent injunction issued in *A.M.T. v. Gargano* and to incorporate requirements in Ind. Code 25-23.5-3 and Ind. Code 25-23.5-1-6 affecting occupational therapy assistants.

**5. Any regulatory flexibility analysis that considers any less intrusive or less costly alternative methods of achieving the same purpose.**

Other factors considered:

**A. Establishment of less stringent compliance or reporting requirements for small businesses.**

The FSSA – OMPP did not consider establishing less stringent compliance or reporting requirements for small businesses. All regulated entities are treated the same. The proposed rule is necessary for FSSA – OMPP to comply with the permanent injunction issued in *A.M.T. v. Gargano* and to incorporate requirements in Ind. Code 25-23.5-3 and Ind. Code 25-23.5-1-6 affecting occupational therapy assistants.

**B. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses.**

The FSSA – OMPP did not consider establishing less stringent schedules or deadlines for compliance or reporting requirements for small businesses. All regulated entities are treated the same. The proposed rule is necessary for FSSA – OMPP to comply with the permanent injunction issued in *A.M.T. v. Gargano* and to incorporate requirements in Ind. Code 25-23.5-3 and Ind. Code 25-23.5-1-6 affecting occupational therapy assistants.

**C. Consolidation or simplification of compliance or reporting requirements for small businesses.**

The FSSA – OMPP did not consider consolidating or simplifying compliance or reporting requirements for small businesses. All regulated entities are treated the same. The proposed rule is necessary for FSSA – OMPP to comply with the permanent injunction issued in *A.M.T. v. Gargano* and to incorporate requirements in Ind. Code 25-23.5-3 and Ind. Code 25-23.5-1-6 affecting occupational therapy assistants.

**D. Establishment of performance standards for small businesses instead of design or operational standards imposed on other regulated entities by the rule.**

The FSSA – OMPP did not consider establishing performance standards for small businesses affected by this rule. All regulated entities are treated the same. The proposed rule is necessary for FSSA – OMPP to comply with the permanent injunction issued in *A.M.T. v. Gargano* and to incorporate requirements in Ind. Code 25-23.5-3 and Ind. Code 25-23.5-1-6 affecting occupational therapy assistants.

**E. Exemption of small businesses from part or all of the requirements or costs imposed by the rule.**

The FSSA – OMPP did not consider exempting small businesses from the requirements or costs imposed by the rule. All regulated entities are treated the same. The proposed rule is necessary for FSSA – OMPP to comply with the permanent injunction issued in *A.M.T. v. Gargano* and to incorporate requirements in Ind. Code 25-23.5-3 and Ind. Code 25-23.5-1-6 affecting occupational therapy assistants.

If there are any programmatic or fiscal questions, please contact Amanda Alvey at 234-5551 or at [amanda.alvey@fssa.IN.gov](mailto:amanda.alvey@fssa.IN.gov). Questions regarding any other aspect of the proposed rule should also be addressed to Kim Crawford at 232-1244 or [kim.crawford@fssa.in.gov](mailto:kim.crawford@fssa.in.gov).

Please contact Kim Crawford at 232-1244 or [kim.crawford@fssa.in.gov](mailto:kim.crawford@fssa.in.gov) regarding OSBE's comments about this proposed rule. The public hearing will be scheduled after receiving authorization from Legislative Services Agency to do so. Ms. Crawford will then contact you to provide the date of the hearing for your convenience.

Attachments: LSA Document #14-337: Notice of Intent, Proposed Rule